# STATE OF MICHIGAN

# COURT OF APPEALS

GATCHBY PROPERTIES, L.P.,

Plaintiff-Appellant,

v

ANTRIM COUNTY ROAD COMMISSION, HELENA TOWNSHIP, ASSOCIATION FOR THE PRESERVATION OF PUBLIC ACCESS, and MICHAEL CRAWFORD,

Defendants-Appellees,

and

ISABEL AMERSON,

Defendant.

UNPUBLISHED
April 25, 2006

No. 258909
Antrim Circuit Court
LC No. 97-007232-CH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

WHITBECK, C.J. (*dissenting*).

I respectfully dissent. The majority concludes that "the Main document" was authenticated and that it fell within an exception to the rule excluding hearsay. I agree with neither conclusion. More importantly, however, I conclude that the both majority and the trial court have missed the point of the Supreme Court's remand in *Gatchby II*[1] and of this Court's remand in *Gatchby III*.[2] I would therefore reverse and remand for entry of judgment for plaintiff on the affirmative defense of condemnation.

[1] *Gatchby Properties, LP v Antrim Co Rd Comm'n*, 465 Mich 886; 636 NW2d 138 (2001).

[2] *Gatchby Properties, LP v Antrim Co Rd Comm'n* (*On Remand*), unpublished opinion per curiam of the Court of Appeals, issued March 5, 2002 (Docket No. 217417).

## I. The Supreme Court's Remand In *Gatchby II*

### A. *DeFlyer* Estoppel

The Supreme Court's remand in *Gatchby II* revolved around the possible application of "*DeFlyer* estoppel." *DeFlyer* involved a disputed piece of land in Oceana county known as the "stub road." In 1915, the plaintiffs' predecessors in interest signed and filed a written application to "lay out a highway" over the stub road.[3] However, the plaintiffs, by way of a 1921 deed, claimed ownership of the stub road while the defendant claimed it was part of the highway laid out in 1915.[4] In 1961, the defendant began doing work on the stub road, and the plaintiffs sued to enjoin that work. The trial court dismissed the complaint, and the plaintiffs appealed.[5]

The Supreme Court found that the trial court was correct in finding that there was sufficient use and expenditure "on the part of the road west of plaintiffs' premises . . . to constitute a full acceptance of the full length of the road . . . ."[6] The Supreme Court went on to hold that

> plaintiffs are not in a position to challenge the validity of the laying out proceedings in 1915 for lack of service of notice of hearing by the commissioner *because the then owners of plaintiffs' land signed the application or petition therefor*. Also, their action in that respect was the equivalent of at least a common-law if not a statutory dedication of the strip for highway purposes, thus rebutting plaintiffs' complaint of lack of conveyance or dedication of the strip by the property owners. We agree with the defendant that said section 20 of the act bars plaintiffs, after more than 8 years of user without objection by them, from now challenging the regularity of the 1915 proceedings. While the county road commissioners' action under the McNitt act could not deprive plaintiffs of title, it is indicative of the understanding by the township and county officials, at least, that the disputed strip was part of the township's highway system. This is precisely what plaintiffs' predecessors in title had wanted and asked for in their 1915 petition or application.[7]

Thus, there are two elements of *DeFlyer* estoppel. The first is the signature of plaintiffs' predecessor in interest on an application or petition. The second is the passage of time. The latter is not an issue in this case. The former most certainly is.

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[3] *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 398-399; 132 NW2d 92 (1965).

[4] *Id*. at 399.

[5] *Id*. at 400.

[6] *Id*. at 401.

[7] *Id*. at 402 (emphasis supplied, citations omitted).

B. The Language Of The Remand In *Gatchby II*

In its remand in *Gatchby II*, the Supreme Court asked us to address the question whether the trial court's original grant of summary disposition to the defendants must be affirmed. Specifically it asked us to consider whether plaintiff was barred from challenging the regularity of the condemnation proceedings "for the reasons set forth in *DeFlyer* . . . ."[8] Thus, on remand, this Court of necessity was required to consider whether there was a *signature* of plaintiff's predecessor in interest on the application at issue in this case.

II. This Court's Remand In *Gatchby III*

This Court's remand in *Gatchby III* first discussed *DeFlyer* estoppel and stated that it involved a different issue than that addressed in this Court's original opinion: "whether plaintiff should be estopped from challenging the regularity or validity of the proceeding (with respect to the south half of the road) based on its predecessor *signing* the petition."[9] This Court then concluded that "[t]he application of *DeFlyer's* estoppel doctrine rests on the premise that plaintiff's predecessor did in fact *sign* the petition."[10] Thus, this Court explicitly recognized that the *signature* of plaintiff's predecessor in interest on the petition is the central factual issue in this case.

Accordingly, this Court expanded the scope of its earlier remand. It concluded that there was a genuine issue relating to *DeFlyer* estoppel and instructed that:

> If the trier of fact concludes that plaintiff's predecessor in title to the south half of the alleged road *signed* the application, the circuit court shall grant judgment to defendants on the condemnation affirmative defense as to that portion of the property. If the trier of fact does not so conclude, the circuit court shall grant judgment to plaintiff on the affirmative defense of condemnation.[11]

Thus, this Court's instructions to the trial court were crystal clear: the trial court was to determine whether plaintiff's predecessor in interest *signed* the application in question.

III. The Trial Court's Opinion

The trial court begins its discussion of *DeFlyer* estoppel by stating that "[t]he evidence supporting that Jacob E. Decker and William Amerson signed the application to lay out the road is Defendants' Exhibit 14, the record of the report of the Helena Township Highway commissioner John F. Main. That record recites that various freeholders signed the application to lay out the road including specifically William Amerson and Jacob E. Decker."

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[8] *Gatchby II*, *supra* at 886.

[9] *Gatchby III*, *supra* at 7 (emphasis supplied).

[10] *Id*. (emphasis supplied).

[11] *Id*. (emphasis supplied).

However, the trial court then states that the application is not itself in the record book. (Indeed, as plaintiff points out, not only is the application itself entirely missing, so is any copy of the "written notice" to which the Main document refers as well as the affidavit of service to which it also refers). The trial court then goes on to note that the Main document is "bound in the record book and is at a chronologically appropriate location" and finds the likelihood of "it"—apparently referring to the Main document—"being an after-the-fact fabrication is minimal." The trial court goes on to conclude that the "likelihood of it"—again apparently referring to the Main document—"being a fraud created at the time, in 1897, is also slim." The trial court then states that "[t]his makes it very likely that the facts recited in this report are true, i.e. Decker and Amerson were among the petitioners to lay out this road as recited in [Main's report]."

The trial court turns to the question of whether the Main document was genuine because "it was not written by Mr. Main in his own hand" and states that "[i]t seems inescapable that in this township, prior to copy machines or even typewriters, the official record was in fact maintained in the possibly more legible hand of a clerk." The trial court then states that "[t]here is additional evidence which corroborates that William Amerson was a petitioner for laying out the road." This evidence was the fact that W.H. Amerson and spouse Madge Anderson acquired an adjoining property. The trial court concludes that it is unlikely that there would be a William Amerson and a W.H. Amerson owning adjoining parcels at the same time in the same small township in northern Michigan while being different people. On this basis, the trial court finds that the "William Amerson who signed the application to lay out the road was in fact the 'W.H. Amerson' who with his wife, Madge, platted" the adjoining property.

There is only one problem with this reasoning: there is no evidence whatsoever that William Amerson—or for that matter W.H. Amerson, whether the same or a different person—actually *signed* the application. As I have noted, the petition itself is entirely absent from the record. Further, the Main document only refers to "the application hereto attached of William Amerson [and others]." There is no reference in the Main document to a *signature* on that application.

Thus, it is readily apparent that the trial court did not—and could not—comply with this Court's remand in *Gatchby III*. Based on the record before it, the trial court could not determine whether plaintiff's predecessor in interest *signed* the application in question. The reason for this is straightforward: the application itself is nowhere in the record, and the Main document does not tell us whether Amerson actually signed the application. Therefore, *DeFlyer* estoppel could not apply because an essential element—a signature—is missing. Under such circumstances, the trial court could only take one action. By the explicit language of the *Gatchby III* remand, the trial court—since it could not conclude based on the evidence before it that Amerson actually signed the application—was required to grant judgment to plaintiff on the affirmative defense of condemnation. Its failure to do so was an abuse of discretion.

## IV. The Majority's Opinion

The majority responds to this dissent by stating, "By finding that the Main document was properly submitted into evidence, we are also concluding that there exists *proper evidence* that Amerson and Decker signed the application to lay out the road."[12] There is no such evidence, proper or otherwise. Indeed, the Main document does not say that Amerson and Decker signed the application. The Main document, to the extent that it is legible, appears to refer to an "application hereto attached of William Amerson, Jacob C. Decker, [et al]."[13] There is no indication whatsoever that Amerson actually signed the application.

Notably, the majority then goes on to say that "The signing of the petition is a necessary implication from Main's statement." I think not. One could as easily infer that Amerson did *not* sign the application, but that Decker or someone else submitted it in his name, as well as the names of the others listed. In any event, an implication is not evidence. But it is on this, and apparently this alone, that the majority bases its decision as it relates to the signature requirement. This satisfies neither the Supreme Court's remand in *Gatchby II* nor this Court's remand in *Gatchby* III.

I would therefore reverse and remand with instructions to the trial court to grant judgment to plaintiff on the affirmative defense of condemnation.

/s/ William C. Whitbeck

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[12] *Ante* at___(emphasis supplied).

[13] *Id.*